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December 23, 2020

Deana Williamson, Clerk
Court of Criminal Appeals of Texas
via e-file

Re: *Ex parte Joseph Gomez*
Case Nos. PD-0724-20 and PD-0725-20
Fourth Letter of Supplemental Authority

Dear Ms. Williamson:

After further consideration of the very important issues presented in this case, pursuant to Rule 75.3, Texas Rules of Appellate Procedure, on behalf of Mr. Gomez and my co-counsel, I am submitting this fourth letter of supplemental authority to inform this Court of additional authority, including a relevant decision issued by the Court of Appeals last week in another case, as well as to modify our position from oral argument.

The role of the magistrates, especially those here in Harris County, cannot be understated. The magistrates here have concurrent — not lesser — jurisdiction than district court judges like the trial court when it comes to bail determinations. *See* TEX. GOV'T CODE § 54.851 – .861 (West 2020). They are given the first opportunity to "determine the amount of bail and grant bail pursuant to Chapter 17, Code of Criminal Procedure, and as otherwise provided by law" to a defendant. TEX. GOV'T CODE § 54.858(b) (West 2020). And, as the Court of Appeals noted in an opinion handed down last week in a separate case, the State Commission on Judicial Conduct has found that those magistrates are also held to the same legal and ethical standards as the district court judges when it comes to

those bail determinations. *Hagstette, et al v. State Comm'n on Judicial Conduct*, No. 01-19-00208-CV, 2020WL 7349502, at *3 (Tex. App.—Houston [1st Dist.] Dec. 15, 2020, no pet. h.)(mem. op., not designated for publication)(noting findings by the Commission that Harris County magistrates acted in violation of Canons requiring judges to comply with and be faithful to the law by failing to consider personal bonds and following directives from district court judges to deny the same).

During oral argument, Judge Keel questioned whether a magistrate should be "put above" a trial court judge to the point where the magistrate's decisions are "practically unreviewable." While we agree that a trial court judge should not be entirely beholden to the magistrate's bail decision, as reflected in *Hagstette*, the magistrate and trial court judges are equals in terms of jurisdiction over bail decisions and, as such, the magistrate's decision on bail should be given the same deference afforded to the trial court judge. To that end, it cannot be overlooked that the magistrate here considered an abundant amount of information, as well as advocacy from attorneys representing the State and Mr. Gomez, before it set Mr. Gomez's bail amounts at $40,000, a reasonable amount given the facts and circumstances presented. In doing so, the magistrate did not in any way abuse its discretion. This leads to another, more critical point regarding the role of the magistrate and the role of the trial court who has jurisdiction over a defendant who has been released after giving a bond.

Although we have previously maintained that there is a distinction between the bond and the bail amount set by the magistrate, and that Article 17.09 *only* allows for the trial court judge to require a second bond when the first bond amount is insufficient and not when the bail amount set by the magistrate is insufficient, upon further reflection, we believe there is another possible, more logical interpretation of the statute.

We believe that Article 17.09 could be interpreted to allow the trial court to require a second bond to be given in *both* situations, that is, when the bond amount is insufficient (like with a differential bond as discussed in our last letter) *and* when the bail amount set by the magistrate is clearly insufficient. The latter situation would fall into what I

referred to at oral argument as the "catch-all provision" of Article 17.09, the provision that requires "other good and sufficient cause." *See* TEX. CODE CRIM. PROC. art 17.09 (West 2020). In other words, to use Judge Keasler's example, if the magistrate set a $5 bail amount for a person who shot up a school yard, a second bond could be required if *either* the person gave a bond of insufficient amount, say $2, or for the "good and sufficient cause" that the $5 bail amount set by the magistrate was clearly insufficient to meet the purposes of bail.

Support for the distinction between the bond and the bail amount set by the magistrate can be found in one of our original criminal procedure statutes. In 1907, the Legislature passed S.B. 94 which amended Article 325 of the Code of Criminal Procedure, a bill "pertaining to the taking of bail in felony cases when the court [was] in session, and authorizing the sheriff or other peace officer having in custody the accused to take bail bond." *See* Acts 1907, 30th Leg. R.S., ch. 71, 1907 General Laws of Texas 148 (located at https://lrl.texas.gov/scanned/sessionLaws/30-0/SB_94_CH_LXXI.pdf). More specifically, as the statute provided, the court would "fix the *amount of bail*, if it [was] a bailable case," and the sheriff or other peace officer was "authorized to take a *bail bond* of the accused, if executed with good and sufficient sureties, *in the amount as fixed by the court . . . .*" *Id.* (emphasis added). This statute eventually became what is now Article 17.21. *See* TEX. CODE CRIM. PROC. 17.21 (West 2020).

It was not until fifty years later in 1957, when as discussed in the State's Brief, the Legislature adopted Article 275a, which eventually became current Article 17.09. *See* Acts 1957, 55th Leg. R.S., ch. 46, 1957 Tex. Gen. Laws 94, 94–95 (located at https://lrl.texas.gov/scanned/sessionLaws/55-0/HB_71_CH_46.pdf). This was the first time the "other good and sufficient cause" provision for requiring a second bond came into existence.

Considering these two statutes together and the historical nature of each, a logical interpretation could be that Article 275a was passed to address issues that could have arisen between the amount of bail set by the magistrate and the bail bond taken to secure the defendant's re-

lease. This included if the bond was more or less than the amount fixed by the magistrate.

What amounted to "other good or sufficient cause" was not considered in the caselaw until *King* when this Court held there was no "good and sufficient cause" for revoking the $10,000 bond posted by the defendant in that case. *Ex parte King*, 613 S.W.2d 503, 504–05 (Tex. Crim. App. 1981). Even then, however, this Court did not consider whether the trial court could have revoked the bond on the basis that the amount set by the magistrate was insufficient in amount. *Id.* It was not until the Fourteenth District Court of Appeals considered the issue in *Miller v. State*, 855 S.W.2d 92 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) that a court again weighed in on Article 17.09's "other good and sufficient cause." There, the court held that a trial court did not abuse its discretion in revoking a defendant's bond and requiring a second, higher bond after he was arrested for murder and a misdemeanor marijuana case while on bond for a felony drug case. *Id.* at 94. It was in this case that the court recognized for the first time that, "[n]o precise standard exists for determining what constitutes 'good and sufficient cause' under Article 17.09," and that, accordingly, "each case must be reviewed on a fact-by-fact basis." *Id.* at 93–94.

Aside from a spattering of unpublished opinions, there was no further consideration by an appellate court of whether an "other good and sufficient cause" could be a finding that the original bail amount set by a magistrate was insufficient until *Hernandez v. State* and *Liles v. State*, both discussed and considered by the Court of Appeals in this case and referenced at oral argument.

By considering these cases — and, more importantly, how they looked at whether a bail amount set by a magistrate was no longer sufficient — we still believe the Court of Appeals got it right in holding that the trial court judge here abused its discretion by overriding the bail decision of the magistrate. *See Ex parte Gomez*, slip op. at 16–18 (discussing *Hernandez* and *Liles*). The Court of Appeals correctly looked at the facts and circumstances of Mr. Gomez's case, weighed and considered the factors set out in Article 17.15, considered *Hernandez* and *Liles* in terms of when the bond based on a bail amount set by the magistrate is no long-

er sufficient, and to quote them, found "none of the evidence before [the trial court] at the November 15 and 18, 2019 bond hearings supported revoking the original bond, rearresting Gomez, and increasing the amount of bail under the factors that both the trial court and this court are required to consider." *Id.* at 14. As they went on to say, "The only new information was that Gomez had given bail and appeared in court. There was no information on which the court could find a change in the balance of the State's interest in assuring Gomez's presence at trial as compared with the interest in preserving the presumption of innocence." *Id.* at 15. That is the appropriate standard that we believe this Court should employ.

This interpretation aligns itself with the caselaw. It means a trial court cannot revoke a $10,000 bond just because it does not like that it has to grant a continuance. *See King*, 613 S.W.2d at 504–05. It also means a trial court cannot revoke a $100,000 bond where a defendant was three minutes late to a court appearance and failed to appear with an attorney as previously ordered by the trial court. *See Meador v. State*, 780 S.W.2d 836, 837 (Tex. App.—Houston [14th Dist.] 1989, no pet.). It could even mean that a trial court cannot revoke a defendant's bond even though he was arrested for a misdemeanor offense of theft while on bail for burglary of a habitation because he "appeared for trial in connection with the misdemeanor shoplifting charge after being admitted to bail in that cause tend[ing] to show that [he] is more, not less, likely to appear for trial . . . ." *See Queen v. State*, 842 S.W.2d 708, 712 (Tex. App.—Houston [1st Dist.] 1992, no pet.).

But it does mean a trial court *can* revoke a bond and make the defendant give a higher bond when, like in *Hernandez*, there is new evidence that makes it more likely that the defendant committed the offense, or *Liles*, when the charge the defendant is facing is upgraded to a more serious offense that carries with it a higher punishment range. In both these latter cases, the "balance of the State's interest in assuring [the defendant's] presence at trial compared with the interest in preserving the presumption of innocence" changed and, accordingly, the trial courts were permitted to step in and, as "good and sufficient cause" require the defendants in those cases to give a new bond.

This interpretation also accomplishes what the State is advocating for in this case. In his response to a final question by Judge Walker, counsel for the State noted, "My standpoint here doesn't really advocate for the prosecution, we're advocating for trial court discretion." It cannot be overlooked that the State never argued at the November 15 or 18 hearings that the $40,000 bail amount in Mr. Gomez's case was insufficient. That is because, in the State's view, there was no "reason" for considering that his bail amount was insufficient, and thus, no reason for revoking the $40,000 bonds and raising the bail amount to $150,000. If there was a reason set forth by the State or presented to the trial court, then the trial court arguably had the authority to require a new, second, higher bond provided there was due process, a hearing where the Rules of Evidence applied, and an opportunity for Mr. Gomez to respond to those reasons. But, as the Court of Appeals correctly held, absent that reason, the trial court abuses its discretion.

Finally, this interpretation accords with Articles 16.16 and 23.11 referenced in the State's brief and discussed in questions by Judge Slaughter. As I mentioned in my response to Judge Slaughter's question, Article 16.16 only refers to the "bail taken in any case" and the "bond" as being insufficient, not the amount of bail set by the magistrate. *See* TEX. CODE CRIM. PROC. art 16.16 (West 2020). Article 23.11 uses those same terms. *See* TEX. CODE CRIM. PROC. art 23.11 (West 2020). That is because, following the plain language, those statutes only apply in those limited circumstances. Noticeably absent from those statutes is the "catch-all" provision of "other good and sufficient cause" that we see in Article 17.09. *Cf.* TEX. CODE CRIM. PROC. arts. 17.09, 16.16, 23.11. If this Court adheres to our proposed interpretation, it permits a trial court to require a second bond when it believes the bail amount set by the magistrate is clearly insufficient as "other good and sufficient cause" under Article 17.09 (after a hearing with due process and admissible evidence) but limits the State from coming to this Court with an "emergency motion" supported only by an affidavit every time it disagrees with the bail amount set by the magistrate under Articles 16.16 and 23.11.

In sum, a trial court cannot revoke a bond based on an amount set by a magistrate with concurrent jurisdiction as "insufficient" on a "whim." There has to be, as the statute and caselaw requires, a really "good and

sufficient" cause to declare that the amount set by the magistrate is no longer sufficient to maintain the balance between the State's interest in assuring a defendant like Mr. Gomez's presence at trial and the interest in preserving the presumption of innocence. Equally important, as I stated in argument, there has to be due process and admissible evidence presented at a hearing before doing so. *See United States v. Salerno*, 481 U.S. 739, 746–50, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) ("When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner"; upholding the Bail Reform Act and noting the procedural protections before bail is denied including "a full-blown adversary hearing," where "the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person"); *Morrissey v. Brewer*, 408 U.S. 471, 480–90, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)(discussing the applicability of due process when a parolee's liberty is deprived and setting out minimal requirements for complying with due process); *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756, 1759, 36 L. Ed. 2d 656 (1973)(following *Morrissey* and recognizing due process protections as they apply at proceedings to revoke probation). Just as in Mr. Gomez's case, we are talking about a situation where a judicial officer is taking a person's liberty away a second time typically after they have paid a bondsman some premium to post a surety bond, a premium that they will never get refunded.

For all these reasons, we again respectfully request this Court to find that the Court of Appeals correctly concluded that the trial court abused its discretion and affirm that decision.

Respectfully Submitted,

/s/ T. Brent Mayr
T. Brent Mayr
Attorney for Applicant, Joseph Gomez

cc: Clint Morgan, attorney for the State
& State Prosecuting Attorney Stacey Soule via service through counsel's electronic filing manager on December 23, 2020

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